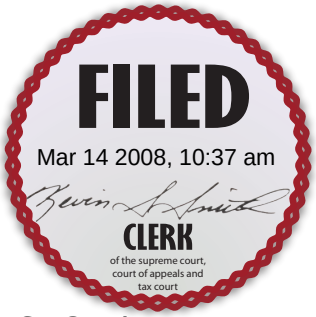

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IN THE COURT OF APPEALS OF INDIANA

CESAR DE LA ROSA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0710-CR-562
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No.79D01-0607-FC-68

March 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Cesar De La Rosa appeals his eighteen-year sentence for operating a motor vehicle with a controlled substance in blood causing death, a Class B felony, and possession of marijuana, a Class A misdemeanor. De La Rosa raises three issues, one of which we find dispositive; whether the trial court violated the terms of the plea agreement.[1] Concluding the trial court violated the terms of the plea agreement, we reverse and remand.

Facts and Procedural History

On July 12, 2006, De La Rosa was driving his vehicle when the vehicle in front of him stopped unexpectedly. De La Rosa swerved to avoid hitting the vehicle, and unintentionally hit the accelerator after his foot slipped off the brake. De La Rosa drove up onto a sidewalk and hit a nine-year-old child. The child died as a result of the accident. De La Rosa admitted to having consumed one beer and smoked marijuana that morning. De La Rosa also possessed marijuana at the time of the accident.

On July 20, 2006, the State charged De La Rosa with operating a vehicle while intoxicated causing death, a Class C felony; operating a motor vehicle with a controlled substance in blood causing death, a Class C felony; reckless homicide, a Class C felony; possession of marijuana, a Class A misdemeanor; possession of paraphernalia, a Class A

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[1] De La Rosa also argues that the trial court abused its discretion in finding the aggravating and mitigating circumstances and that his sentence is inappropriate given the nature of the offense and his character. Because we reverse and remand with instructions that the trial court either reject the plea agreement or order a sentence conforming to the plea agreement, we find it unnecessary to address these arguments. Although we sometimes address whether a sentence is inappropriate when we find other errors in

misdemeanor; and maintaining a common nuisance, a Class D felony. The State subsequently added a count of operating a motor vehicle with a controlled substance in blood, a Class B felony.[2]

On May 9, 2007, De La Rosa pled guilty to operating a motor vehicle with a controlled substance in blood causing death, a Class B felony, and possession of marijuana. Pursuant to the plea agreement (the "Agreement"), the State dropped the remaining charges, including those under an unrelated cause number. The Agreement also stated, "The parties agree that the executed portion of the sentence may not exceed fourteen (14) years." Appellant's Appendix at 8.

On June 21, 2007, the trial court held a sentencing hearing. Following this hearing, the trial court issued a sentencing order in which it identified De La Rosa's age, his guilty plea, his General Education Degree, and good work history as mitigating factors, and the fact that De La Rosa committed the offense while out on bond, his juvenile history, his history of substance abuse, the impact on the family,[3] his "acute marijuana dependence that he has

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the sentencing process, in this case we find it improvident to do so, as the trial court may either issue a shorter sentence or reject the plea agreement entirely on remand.

[2] The offense of operating a motor vehicle with a controlled substance in one's blood is elevated to a Class B felony if the offender is at least twenty-one years old at the time of the offense. See Ind. Code § 9-30-5-5(a)(2), (b)(2).

[3] Although we make no definite holding on this point, we wish to point out that in order to find the impact on the victim's family to be an aggravating circumstance, the trial court must explain how the impact on the family was different than the impact which normally results from the commission of the offense. McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007). Our supreme court has explained that "[b]ecause the terrible loss that accompanies the loss of a family member accompanies almost every murder, this impact on the family is encompassed within the range of impact which the presumptive sentence is designed to punish." Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). Also, in order to properly find the impact on family to be an aggravating circumstance, such harm must have been foreseeable by the defendant. Id. We note that De La Rosa did not choose his victim, and find it hard to imagine how any impact not normally associated with

failed to address," and the victim's age to be aggravating circumstances. Id. at 105. The trial court then sentenced De La Rosa to "fourteen (14) years at the Indiana Department of Correction, followed by four (4) years on supervised probation to be served at Tippecanoe County Community Correction as a condition of probation." Id. De La Rosa filed a motion to correct error, arguing that the sentence violated the plea agreement as "it is well settled in Indiana that conditions of probation imposed by a trial court that, 'materially add to a punitive obligation . . . may not be imposed in the absence of a plea agreement provision giving the trial court discretion to impose conditions of probation.'" Id. at 107-108 (quoting Jones v. State, 789 N.E.2d 1008 (Ind. Ct. App. 2003), trans. denied). The State filed a response, agreeing that the sentence "exceeds the boundaries of the plea agreement." Id. at 109. The State then filed an amended responses, arguing that the sentence did not violate the plea agreement, citing a decision of another panel of this court, Shaffer v. State, 755 N.E.2d 1193 (Ind. Ct. App. 2001). The State then filed third response, in which it acknowledged a conflict between this court's decisions, and "offer[ed] them to the court for consideration." Id. at 111. The trial court denied De La Rosa's motion to correct error. In denying this motion, the trial court made no comment on the case law, but "note[d] that in our community, Tippecanoe County Community Corrections has a way of transitioning offenders back into the community that ensures proper services based on assessed needs." Id. at 113. De La Rosa now appeals.

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his crime could therefore have been foreseeable. Based on these considerations, we express considerable doubt that the impact on the victim's family is a proper aggravator given the facts of this case.

Discussion and Decision

"As a general proposition trial courts have broad discretion in setting conditions of probation, subject to appellate review only for an abuse of discretion." Freije v. State, 709 N.E.2d 323, 324 (Ind. 1999). However, when probation is imposed following a plea agreement, a trial court's discretion is more limited. See id. This limitation derives from the contractual nature of a plea agreement entered into by the State and the defendant. See Allen v. State, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). A trial court has discretion to accept or reject a plea agreement. Id. However, given the importance of plea-bargaining to our criminal justice system, once a trial court accepts a plea agreement, the trial court, defendant, and the State are bound by its terms. Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004); Ind. Code § 35-35-3-3(e) ("If the court accepts a plea agreement, it shall be bound by its terms."). Therefore "strict adherence to the agreement is essential." Schippers v. State, 622 N.E.2d 993, 994 (Ind. Ct. App. 1993).[4] A trial court that has accepted a plea agreement "is precluded from imposing any sentence other than required by the plea agreement." Allen, 865 N.E.2d at 689. Therefore, trial courts must adhere to limitations on the executed portion of a sentence outlined in plea agreements. Abernathy v. State, 852 N.E.2d 1016, 1021 (Ind. Ct. App. 2006).

The Agreement limited the executed portion of De La Rosa's sentence to fourteen

[4] Certain exceptions, not applicable to the case at bar, exist to this general rule. See, e.g., Lockert v. State, 711 N.E.2d 88, 90 (Ind. Ct. App. 1999) (recognizing that provisions waiving the right to post-conviction relief are void and unenforceable); Sinn v. State, 609 N.E.2d 434, 436 (Ind. Ct. App. 1993) ("[W]e would not enforce a sentence of death for jay walking simply because the sentence was the product of a plea agreement.").

years. The trial court retained authority to sentence De La Rosa to a longer aggregate sentence and suspend any portion of the sentence in excess of fourteen years to probation. Id. at 1021 (where plea agreement called for five-year executed sentence cap, trial court's sentence of eight years with three years suspended to supervised probation complied with the plea agreement). The trial court also retained discretion to "impose administrative or ministerial conditions as terms of probation, even if such terms are not included in the plea agreement." S.S. v. State, 827 N.E.2d 1168, 1171 (Ind. Ct. App. 2005), trans. denied. However, "a condition of probation which imposes a substantial obligation of a punitive nature is indeed part of the sentence and penalty and must be specified in the plea agreement." Freije, 709 N.E.2d at 324 (quoting Disney v. State, 441 N.E.2d 489, 494 (Ind. Ct. App. 1982)). Unless a plea agreement specifically grants the trial court the discretion to impose the conditions of probation, only those terms of probation "that do not materially add to the punitive obligation may be imposed consistent with the court's obligation to be 'bound by [the plea agreement's] terms.'" Id. at 325.

The State points to Shaffer v. State, 755 N.E.2d 1193, 1195 (Ind. Ct. App. 2001), in which another panel of this court held that "the portion of a defendant's sentence involving placement on work release does not constitute a part of the executed sentence," and that therefore, the trial court did not violate a plea agreement's three-year cap on executed time when it ordered the defendant to serve two years executed, two years on inactive probation on work release, and two years on active probation. The majority in Shaffer did not cite Freije. Judge Vaidik concurred in the result, concluding that placement in community

corrections as a condition of probation constituted suspended, and not executed, time, but that direct placement in community corrections constitutes executed time. Id. at 1198. Judge Vaidik also recognized that the plea agreement in that case granted the trial court "discretion to impose imprisonment in the appropriate facility as a condition of probation under the terms of the agreement," and therefore concluded that such placement did not violate Freije. Id. at 1198 n.4.

We find Shaffer therefore inapplicable, as the Agreement contains no statement regarding the trial court's authority to establish the terms and conditions of probation. Cf. Antcliff v. State, 688 N.E.2d 166, 169 (Ind. Ct. App. 1997) (distinguishing Disney on the grounds that the plea agreement in the instant case "specifically provides that the trial court shall have the authority and discretion to establish the terms of probation"). Therefore, we must determine whether the trial court's order that De La Rosa serve four years at Tippecanoe County Community Correction as a condition of probation[5] materially added to De La Rosa's punishment.[6] See Freije, 709 N.E.2d at 325. A community corrections program

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[5] We note that the trial court did not have the authority to place De La Rosa directly into community corrections. See Ind. Code § 35-38-2.6-1(b)(4) (stating that Indiana Code chapter 35-38-2.6, Direct Placement in Community Corrections Program, does not apply to persons convicted of operating a vehicle while intoxicated causing death); Simmons v. State, 773 N.E.2d 823, 826 (Ind. Ct. App. 2002) (recognizing that Indiana Code section 35-39-2.6.-1(b) "precludes a defendant's placement in a community corrections program for the nonsuspendable portion of his or her sentence" for the specified crimes), trans. denied.

[6] The State neither cited nor attempted to distinguish Freije, and has instead relied on the majority opinion in Shaffer. To the extent that the majority opinion in Shaffer is inconsistent with our supreme court's holding in Freije, we are bound to follow the holdings of our supreme court. See Scott v. State, 871 N.E.2d 341, 344 n.4 (Ind. Ct. App. 2007), trans. denied; Monroe Guar. Ins. Co. v. Monroe, 677 N.E.2d 620, 623 (Ind. Ct. App. 1997), trans. dismissed.

> means a community based program that provides preventive services, services to offenders, services to persons charged with a crime or an act of delinquency, services to persons diverted from the criminal or delinquency process, services to persons sentenced to imprisonment, or services to victims of crime or delinquency, and is operated under a community corrections plan of a county and funded at least in part by the state subsidy provided in Ind. Code 11-12-2.

Ind. Code § 11-12-1-1. Such programs may include:

> (1) Residential or work release programs.
> (2) House arrest, home detention, and electronic monitoring programs.
> (3) Community restitution or service programs.
> (4) Victim-offender reconciliation programs.
> (5) Jail services programs.
> (6) Jail work crews.
> (7) Community work crews.
> (8) Juvenile detention alternative programs.
> (9) Day reporting programs.
> (10) Faith based programs.
> (11) Other community corrections programs approved by the department.

Ind. Code § 11-12-1-2.5(a). Tippecanoe County Community Corrections consists of three programs: home detention, road crew, and work release. See Tippecanoe County Community Corrections, www.tippecanoe.in.gov/community_corrections/ (last visited February 26, 2008). The road crew program is for "those who have been court ordered to perform a certain number of unpaid hours in lieu of being incarcerated in state prison or county jail. People on Road Crew pay a fee to be on the program." www.tippecanoe.in.gov/community_corrections/division.asp?fDD=35-189 (last visited February 26, 2008). Therefore, the program is akin to court-ordered community service.

Our supreme court has specifically indicated that home detention and community service are conditions that must be identified in a plea agreement under the present circumstances. Freije, 709 N.E.2d at 325. Tippecanoe County's work release program is

more "restrictive and severe" than its road crew or home detention programs. See http://www.tippecanoe.in.gov/community_corrections/division.asp?fDD=35-190 (describing the work release program as "the most restrictive and severe sentencing available in our local criminal justice system, short of straight jail time") (last visited February 26, 2008). In sum, our supreme court has specifically indicated that two of the three components of Tippecanoe County's Community Corrections materially add to the punitive nature of a defendant's punishment, and the third component, work release, is described by the county as being even more restrictive. Further, we have previously recognized, "[a]n 'executed sentence' is one that is actually served in a correctional facility, or other alternative correctional program, such as work release or home detention as opposed to a suspended sentence or sentence of probation." Hildebrandt v. State, 770 N.E.2d 355, 360 (Ind. Ct. App. 2002) (emphasis added), trans. denied. We conclude the condition that De La Rosa serves his probation through community corrections is a substantial and burdensome condition. Cf. Johnson v. State, 716 N.E.2d 983, 985 (Ind. Ct. App. 1999) (concluding a requirement that the defendant submit to polygraph examinations as a condition of probation was not a substantial obligation and was less burdensome than home detention, community service, or restitution); Disney, 441 N.E.2d at 494 (concluding requirement that defendant pay restitution was punitive).

As this condition was burdensome and punitive, we conclude that the trial court violated the plea agreement. By sentencing De La Rosa to fourteen years incarceration followed by four years in community corrections, the trial court materially added to the punitive obligation set forth in the Agreement, thereby triggering the requirement in Frieje

that the plea agreement specifically grant the trial court the discretion to set the terms of probation. See 709 N.E.2d at 325. Because the Agreement did not grant the trial court this authority, the trial court violated the Agreement by issuing an executed sentence that exceeded fourteen years.

Conclusion

We conclude the sentence ordered by the trial court violates the Agreement. We reverse the sentence and remand with instructions that the trial court either reject the Agreement, or order a sentence that conforms to its written terms.

Reversed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.